WRITTEN TESTIMONY OF JAY A. SEKULOW, Esq. On the constitutionality of S. 97 - a bill to require the installation and use by schools and libraries of internet filtering software

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March 4, 1999

1. INTRODUCTION

Public libraries were created to lend books, provide research tools, and make available educational opportunities to its citizens. The Supreme Court has described a library as "a place dedicated to quiet, to knowledge, and to beauty." Brown v. Louisiana, 383 U.S. 131, 142 (1966). Libraries, therefore, have an affirmative duty to provide materials which will benefit the surrounding community and to restrict illegal and harmful materials.

Children's unrestricted access to the Internet fails to fulfill this duty. The Internet is obviously a very valuable educational resource, and many can benefit from access to that information resource free of charge at public libraries. The vast majority of the pornography which saturates the Web is neither educational, nor beneficial, and in many jurisdictions the exposure of minors to such materials is illegal. Therefore, to avoid liability, libraries will have to adopt some form of Internet filtering process for minors.

Additionally, libraries, like other employers, have an affirmative duty to provide a workplace which is free from pornography. Pornography creates a hostile work environment, as well as a hostile environment for patrons not wishing to be exposed to such material. Internet filtering prevents libraries from becoming peep show parlors. That is constitutionally sufficient for upholding the use of such software.

2. LIBRARIES HAVE AN AFFIRMATIVE RESPONSIBILITY TO PROTECT CHILDREN

Libraries have a duty to the public in their dealings with children. As the U.S. Supreme

Court has stated: "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling . . . the legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. The judgment, we think, easily passes muster under the First Amendment." New York v. Ferber, 458 U.S. 747, 756-758 (1982) (citations and internal quotation marks omitted).

Accordingly, the Supreme Court has long held that the government has a compelling interest in protecting the physical and psychological well-being of minors. Ginsberg v. New York, 390 U.S. 629, 639-640 (1968); Sable Communications v. FCC, 492 U.S. 115, 126 (1988); Denver Area Educational Telecommunications Consortium v. FCC, 116 S.Ct. 2374, 2387 (1996). "This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at 126. This compelling interest extends to the state acting in *loco parentis* for children. As the Supreme Court reiterated in Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986):

> This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. In *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. *Board of Education v. Pico*, 457 U.S. 853, 871-872, 102 S.Ct. 2799, 2814-2815, 73 L.Ed.2d 435 (1982) (plurality opinion); *id.*, at 879-881, 102 S.Ct., at 2814-2815 (BLACKMUN, J., concurring in part and in judgment); *id.*, at 918-920, 102 S.Ct., at 2834-2835 (REHNQUIST, J., dissenting). These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco*

> *parentis,* to protect children)especially in a captive audience)from exposure to sexually explicit, indecent, or lewd speech.

Accordingly, the Court held that: "petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker,* the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission." *Id.* at 685.

There is *absolutely no constitutional protection* for child pornography, yet child pornography is on the Internet. As the Supreme Court held in Osborne v. Ohio, 495 U.S. 105, 111 (1989):

> First, as *Ferber* recognized, the materials produced by child pornographers permanently records the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

(Citations omitted).[1]

The use of children in pornography or predation of children on the Internet is not the only concern, however. It is the *exposure* of pornography to children which represents another real

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[1] *See also* The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2252, which makes it a crime to transport interstate, ship, receive, distribute, or reproduce visual depictions of minors engaged in explicitly sexual conduct. The unlawful receipt of such images includes "transport" by "computer." Accordingly, the violation of this law could easily create *per se* liability for libraries.

harm. The potential harm to children allows the imposition of regulations limiting Internet access. Filtering systems used for the purpose of protecting children is completely constitutional. As the Supreme Court ruled in this regard in FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978):

> . . . broadcasting is uniquely accessible to children, even those too young to read. Although Carlin's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629, 20 LEd2d 195, 88 S. Ct. 1274, 44 Ohio Ops 2d 339, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. *Id.,* at 640 and 639, 20 LEd2d 195, 88 S.Ct. 1274, 44 Ohio Ops 2d 339.

Similarly, the Internet (like broadcasting) "is uniquely accessible to children, even those too young to read." In the context of a library with unfiltered Internet access, it is more than possible that a child may be exposed to what an adult decides to view.

Unquestionably, the Internet contains material that is not suitable for children and that could be harmful to them if allowed to view such material. The argument that children can make choices concerning pornography is not only counter-intuitive, it is in most states illegal. "[D]uring the formative years of childhood and adolescence, minors often lack experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti v. Baird, 443 U.S. 622, 635 (1979). Therefore, to protect the welfare of children and to remove the possibility of any civil liability, libraries should take reasonable steps to ensure that children do not access indecent or pornographic material through the use of the Internet.

It is in the context of the protection of children, that libraries may constitutionally use filtering systems or segregate certain computer systems with filtering software for the use of children from "adult" computers. Otherwise, libraries open themselves up to liability for the inevitable harm caused to innocents viewing pornography for the first time.

3. THE *MAINSTREAM LOUDON* DECISION WAS WRONG

1.

The federal district court for the Eastern district of Virginia in Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 24 F. Supp.2d 552 (1998), declared that Internet filtering software used by a library is unconstitutional. That decision was wrong because the district court used an incorrect forum analysis; it confused access to publically available rooms in the library with the library collection itself. Publically available meeting rooms can easily become public fora, whereas the library collection cannot. As a result of using the wrong forum analysis, the court also erroneously required the library to show a compelling justification for its use of the Internet filtering software.

Also, regardless of the legal analysis, the Mainstream Loudoun case involved using filtering software on all of the computers in the library, 24 F. Supp.2d at 552, whereas the legislation at issue here applies to only some of the computers in any given library (those accessible to children). The Mainstream Loudoun court acknowledged that use of filtering software on only some Internet terminals used by minors would have been a constitutionally less restrictive alternative to the policy it dealt with. *Id.* at 567.

Also, the Fourth Circuit recently overruled a parallel decision by the same federal district

court judge in Urofsky v. Gilmore, 1999 WL 61952 (4th Cir. (Va.)) (Feb. 10, 1999). In Urofsky, a constitutional challenge was brought against a Virginia law restricting state employees from accesssing sexually explicit materials on computers owned or leased by the state. The district court ruled the law unconstitutional, and the Federal Court of Appeals for the Fourth Circuit overturned that decision, holding such restrictions to be constitutional. As the Fourth Circuit ruled:

> We reject the conclusion of the district court that Va. Code Ann. §§ 2.1-804 to -806, restricting state employees from accessing sexually explicit material on computers that are owned or leased by the Commonwealth unless given permission to do so, infringes upon first amendment rights of state employees. The Act regulates the speech of individuals speaking in their capacity as Commonwealth employees, not as citizens, and thus the Act does not touch upon a matter of public concern. Consequently, the speech may be restricted consistent with the First amendment.

Urofsky, 1999 WL 61952 at 3. Similarly, in Mainstream Loudoun v. Bd. of Trustees of the Loudoun County Library, 24 F. Supp.2d 552 (D.Va. 1998), the library had a compelling justification in protecting minors and employees from the harmful and discriminatory effects of pornography. Nonetheless, the library should have been required to meet a lower threshold of scrutiny, and the use of this software should have been upheld.

A. Calling Aesthetic Library Collection Decisions an "Open Forum" Was Erroneous

Aesthetic acquisition decisions concerning a library collection are not the same as renting facilities to the general public and excluding a particular group because of their viewpoint. However, in Mainstream Loudoun, an eastern district of Virginia federal court held that a public library is a "limited public forum," and consequently, use of Internet filtering software was

unconstitutional:

> All three of these factors indicate that Loudoun County libraries are limited public fora and, therefore, that defendant must permit the public to exercise rights that are consistent with the government's intent in designating the Library as a public forum. The receipt and communication of information is consistent with both. Because the policy at issue limits the receipt and communication through the Internet based on the content of that information, it is subject to a strict scrutiny analysis and will only survive if it is necessary to serve a compelling government interest and is narrowly drawn to achieve that end.

Mainstream Loudoun, 24 F. Supp. at 563 (citations and internal quotation marks omitted). The district court's analysis that libraries are public fora, and thus, susceptible to constitutional challenge based upon aesthetic decisions is wrong.

Again,"the Supreme Court [has] identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum."Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985). Traditional public fora include "places which by long tradition or by government fiat have been devoted to assembly and debate. . . ." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). This category includes streets, parks, public sidewalks, and other public places which "have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id*. The government cannot regulate speech in a public forum unless it is "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Id*.

A designated public forum consists of "public property which the state has opened for use by the public as a place for expressive activity." *Id*. In a designated public forum, "[r]easonable

time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Id*. at 46. The government cannot create a public forum by inaction. "The decision to create a public forum must instead be made by intentionally opening a nontraditional forum for public discourse." Cornelius, 473 U.S. at 802.

The Court has recognized a sub-category of designated public fora, the *limited* public forum. Perry, 460 U.S. at 45 n. 7. "In the case of a limited public forum, constitutional protection is afforded only to expressive activity of a genre similar to those that government has admitted to the limited forum." Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688, 692 (2d Cir. 1991). Therefore, those restrictions that do not limit the type of First Amendment activities the government has specifically permitted in the limited public forum need only be reasonable and viewpoint neutral. Perry, 460 U.S. at 46.

The last category of property is nonpublic fora. In a nonpublic forum, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Perry, 460 U.S. at 46. Thus, in this setting, the government may enact and enforce "time, place, and manner regulations, [to] . . . reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression because public officials oppose the speaker's view." *Id*.

A public library does not constitute a traditional public forum. The nature of a library does not permit a patron to engage in most traditional First Amendments activities while in the library. For example, a patron would not be permitted to engage in speeches or any other type of

conduct which would disrupt the quiet and peaceful atmosphere of the library. Similarly, library patrons cannot demand the placement of a book on the library shelves or that the library change its rules and regulations to fit his/her needs. Therefore, the nature of the public library does not lend itself to be classified a traditional public forum.

A library would also not be classified as a designated public forum. As stated before, the government can only create a public forum through actions that express an intent to do so. The opening of a library does not meet that test. The Supreme Court has "recognized that the location of property also has a bearing on this question because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction." International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 680 (1992). Libraries impose many restrictions on the use of their systems which demonstrate that the library is not available to the general public. Additionally, an open forum by government designation becomes "open" because it allows the general public into its facility for First amendment activities. Like the National Endowment for the Arts v. Finley, 118 S.Ct. 2168 (1998) decision, the government purchase of books (like buying art) does not create a public forum.

The same analysis applies in determining that the library is not a limited public forum. The case relied upon by the district court in Mainstream Loudoun, Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242 (3rd Cir. 1992), is inapposite and irrelevant in the determination concerning the types of aesthetic judgments libraries can make about their own circulation. In Kreimer, a homeless man challenged certain library policies which governed patron

activities, dress, and personal hygiene. *Id*. at 1247. Using the limited public forum standard, the court upheld all of the challenged ordinances. *Id*. at 1246. Also, the Kreimer decision rests upon, ISKCON v. New Jersey Sports and Exposition Authority, 691 F.2d 155, 160 (3rd. Cir. 1982), which had nothing to do with a public library, and Concerned Women for America, Inc. v. Lafayette County, 883 F.2d 32, 34 (5th Cir. 1989), which held that a meeting room was an open forum by government designation, and therefore the library could not exclude a religious group wishing to use the room. Thus, the Mainstram Loudoun court created its rationale that library acquisition decisions could be subsumed under the open forum doctrine out of whole cloth.

Since a library is not a traditional public forum and it is not a designated public forum, it will be either a nonpublic forum or a forum in which aesthetic acquisition decisions. The Second Circuit's rational in General Media Communications, Inc. v. Cohen, 131 F.3d 273, *cert. denied*, 118 S. Ct. 2637 (1998), supports the classification of a public library is such a forum. In Cohen, the court was asked to determine the constitutionality of the Military Honor and Decency Act which prohibits the sale of sexually explicit material at military exchanges. *Id*. at 275. In upholding the Act, the court held military exchanges to be a nonpublic forum. *Id*. at 280.

"[W]hen the state reserves property for its 'specific official uses,'" the Second Circuit held, "it remains nonpublic in character." *Id*. at 279 (citing Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995)). "The government's dedication of property to a commercial enterprise is 'inconsistent with an intent to [create] a public forum.'" *Id*. (quoting Cornelius, 473 U.S. at 804). "It is also well established that the presence of some expressive

activity in a forum does not, without more, render it a public forum." *Id*. (citing Cornelius, 473 U.S. at 805).

After establishing these principles, the Second Circuit held that the purpose of the military exchange was to "provide authorized patrons with articles and services necessary for their health, comfort, and convenience and to provide a supplemental source of funding for military morale, welfare, and recreation programs." *Id.* at 280 (internal citations and quotation marks omitted). "[T]he government has simply chosen to purchase certain magazines, newspapers, and videos from third parties, and has offered this merchandise for resale to its personnel at military exchanges. . . . It does not offer to resell the merchandise of every producer, or every 'speaker,' who seeks access to those shelves." *Id*.

Libraries are similarly designed to "provide authorized patrons" with articles necessary for educational and "convenience" purposes. To further those goals, libraries choose certain materials for purchase and offer this material to authorized patrons. Libraries do not open their shelves to every "speaker who seeks access to [their] shelves." Thus, a library, as with a military exchange, is either a nonpublic forum, or a forum of such nature as to allow aesthetic decisions to be made about what will be acquired for the library's collection.

It must also be noted that the Mainstream Loudon court *did* hold that "minimizing access to illegal pornography and avoidance of creation of a sexually hostile environment are compelling interests." 24 F. Supp. at 565. The court went on to hold that, although the challenged policy was over inclusive because it restricted adult Internet access, it would be possible to create a policy

which would protect children. *Id*. at 567. The ultimate solution for this library while the appeal of the district court decision is being evaluated, was to segregate some computers exclusively for the use of children with the filtering software. As of this writing, I am unaware of any challenge to that new policy.

B. The Use Of Filtering Software Is Reasonable And Viewpoint Neutral

Content-based restrictions in such a forum must only be reasonable and viewpoint neutral. The use of Internet filtering software meets these standards. Since "forum" analysis is inapplicable, a library's regulations will be constitutional as long as they are reasonable and viewpoint neutral. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 392 (1993). The regulations are only required to be reasonable, they "need not be the *most* reasonable or the *only* reasonable limitation." Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 808 (1984) (emphasis added). Further, "[t]he reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Id*. at 809.

i. The Use of filtering software to Protect Children and Employees is reasonable.

In Arkansas Educ. Television Comm'n v. Forbes, 118 S.Ct. 1633 (1998), the Court upheld the decision of a public broadcasting station denying a political candidate access to a televised public debate. The Court's reasoning was based on the broadcaster's duty "to schedule programming that serves the public interest, convenience, and necessity." *Id*. at 1639 (internal quotation marks and citations omitted). In furtherance of this duty, "[p]ublic and private

broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming." *Id*. The Court stated that forcing a broadcaster to include all candidates "would actually undermine the educational value and quality of the debates." *Id*. at 1643.

The television station put forth five reasons for excluding Forbes from the televised debate: "(1) the Arkansas voters did not consider him a serious candidate; (2) the news organizations also did not consider him a serious candidate; (3) the Associated Press and a national election result reporting service did not plan to run his name in results on election night; (4) Forbes apparently had little, if any, financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission; and (5) there was no 'Forbes for Congress' campaign headquarters other than his house." *Id*. at 1643-44 (internal quotation marks omitted). These reasons led the television station to conclude that Forbes had generated no appreciable public interest. The Court held that this was a reasonable basis for excluding Forbes from the debate. *Id*. at 1644.

Similarly, ensuring that pornographic material is not accessible at library computer terminals is a reasonable basis for utilizing Internet filtering software. Libraries are designed to serve the "public interest, convenience, and necessity." To further this purpose, libraries are required to "exercise substantial editorial discretion in the selection and presentation" of the material they make available to the public. If libraries were forced to make available every piece of information on the Internet, including obscene material, it would undermine the "educational

value and quality" of the information provided by the library. Library officials, as opposed to the courts, are best equipped to make decisions as to the types of information that the library will make available to the public.

Libraries are designed to promote education in the surrounding communities. Intertwined with this purpose is the duty to promote community values and to protect children from harmful material. Due to the compelling interest in protecting children, placing Internet filtering software on library computers is a reasonable measure designed to protect children from accessing materials which could be harmful to them. Also, even though libraries are not compelled to use the least restrictive means, Internet filtering software is the least restrictive means to block harmful material on the Internet.

Opponents of Internet filtering software, such as the American Library Association (ALA) and the American Civil Liberties Union (ACLU), have proposed several alternatives which they argue would be less restrictive and just as effective. The following are the five alternatives proposed: (1) Acceptable Use Policies - provide carefully worded instructions for parents, teachers, students and libraries on use of the Internet; (2) Time Limits - Establish content neutral time limits on use of the Internet, request that Internet access in schools be limited to school-related work; (3) "Driver's Ed" for Internet Users - condition Internet access for minors on completion of Internet seminar similar to a driver's education course; (4) Recommended Reading - publicize and provide link to websites recommended for children and teens; (5) Privacy Screens - install screens to protect users' privacy when viewing sensitive information and avoid unwanted

viewing of websites by passers-by. ACLU White Paper, *Censorship in a Box: Why Blocking Software is Wrong for Public Libraries* <http://www.aclu.org/issues/cyber/box.html#battling>

First, the first four suffer from the same flaw in assuming that one can avoid offensive material simply by being educated about the Internet. One can hardly imagine a search on the Internet which will not yield at least a few pornographic sites. Many sites are designed to look innocent at first glance so that they can avoid being blocked by Internet filtering software. Second, establishing time limits would in no way limit children's *access* to pornography. It would only limit the *amount* of pornography that they could access. Third, these alternatives suffer from another faulty premise that, if educated, children will not access pornographic sites. In no other aspect of our society does the law trust minors to do what is in their best interest.[1] Children are banned from accessing pornography in every other venue. Public libraries should not be the only place where children are allowed to access such material because we trust them to do what is in their best interest. Lastly, privacy screens will only foster minors' access of pornography by allowing them to do it in private without the fear or embarrassment of being caught. They will in no way decrease the minors' access of pornography. Therefore, none of the alternatives cited by the ALA and ACLU provide any reasonable proof that if placed in use they will be at all effective in curbing the problem of minors' access to pornography.

[1] Minors are banned from a myriad of activities: purchasing alcohol, cigarettes, or pornography; entering a strip joint, bar, or adult bookstore. These laws all illustrate the principle that minors cannot be trusted to make decisions which will be in their best interests.

First, the public school library is a wholly different setting than the public library. The Supreme Court has held time and again that public schools are a unique setting and are subject to unique constitutional constraints. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 584 (1987) (The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure."); Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). Therefore, Board of Educ. Island Trees Union Free School Dist. v. Pico, 457 U.S. 853 (1982), is not applicable to the public library setting where there is no captive audience by virtue of mandatory attendance requirements. Additionally, the Supreme Court noted in Pico that:

> On the other hand, respondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. Tr. of Oral Arg. 36. And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." *Id.*, at 53. In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

457 U.S. 853, 870 (1982)

Second, the Supreme Court has "long recognized that each medium of expression presents special First Amendment problems." FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978). Thus, the Court's analysis on book removal cannot be the standard for the use of Internet filtering software on the Internet. The Internet is a unique medium of expression with no real counterpart.

Therefore, any analysis regarding the Internet will need to be wholly unique to that setting.

Lastly, even if the Pico standard is applied in the present setting, the use of Internet filtering software meets that standard. Pico forbids only the *removal* of books from a school library if the removal is based on the *viewpoint* expressed by the book. "Nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools." Pico, 457 U.S. at 871.

Internet filtering software does not remove any material from a library's collection. The software merely acts as a substitute purchaser for the library. Library personnel are always called upon to exercise their discretion when determining whether to purchase certain materials. In using Internet filtering software, librarians are simply exercising that same discretion, albeit, through a different means. The nature of the Internet does not allow for individual purchase of certain information by a human librarian. However, Internet filtering software is able to play the part that the human librarian has always played. Therefore, the use of Internet filtering software at public libraries does not change in any way the nature in which libraries have conducted their business since their inception.

In fact, *not* using Internet filtering software constitutes a significant change in the nature of libraries. Libraries have always been a safe haven for children; a place which parents could trust that would be beneficial to their children. Libraries are designed to enhance the educational process and to inculcate community values. However, pornographic material permeates the Internet and is readily accessible to the willing, and the unwilling, recipient. If Internet filtering

software is not placed on library computers, it will drastically change the nature of public libraries, and parents can no longer be safe in assuming that their child's visit to the library will be beneficial to their upbringing.

ii. The Use of Internet Filtering Software Is Viewpoint-Neutral.

Viewpoint discrimination is an effort to suppress the speaker's activity due to disagreement with the speaker's view. Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995). A viewpoint is "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id*. at 831. The Supreme Court has consistently recognized that the government may allocate funding according to criteria that would not be permissible in enacting a direct regulation.

This principle was reiterated in Finley, when the Court noted that, "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Id*. at 2179. This principle is firmly ensconced in the Supreme Court's jurisprudence. "It is preposterous to equate the denial of taxpayer subsidy with measures aimed at the suppression of dangerous ideas." Regan v. Taxation with Representation, 461 U.S. 540, 550 (1983). "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program." Rust v. Sullivan, 500 U.S. 173, 193 (1991).

Just as the federal government may determine what types of art it chooses to fund, so also

can public libraries choose the types of information they will make available to the public. A public library's decision to place Internet filtering software on computer terminals in no way restricts individuals' First Amendment rights. Libraries which do so have merely made a choice to, in the words of the NEA regulation, "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public," Finley at 2172, when deciding which information to purchase.

This type of governmental decision stands in stark contrast to the broad provisions of the Communications Decency Act (CDA) which was struck down by the Court in Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1998). The major distinction between the CDA and this piece of legislation is that this is a control not over the Internet, but it is a control being exercised over the receipt of government funds.

Also, in her concurrence in Reno, Justice O'Connor makes clear that this legislation, unlike the CDA, would pass constitutional muster:

> Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. . . If the law does not unduly restrict adults' access to constitutionally protected speech, however, it may be valid. In *Ginsberg v. New York*, 390 U.S. 629, 634 (1968), for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still by the magazines.

117 S. Ct. at 2353 (O'Connor, J., concurring in part and dissenting in part). Similarly, this legislation allows libraries to maintain computers for adult access to the Internet. It simply limits a child's access to pornography on those computers to which children have access. Stated another way, as opposed to the CDA, this proposed legislation does not attempt to control the Internet at

all. Instead, it controls the funding for the gateway through which children have access to the Internet.[1]

Finally, the CDA, Section 223(a)(1)(B)(ii) criminalizes the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age. Another section, 223(d), prohibits the "knowing" sending or displaying, to a person under 18, of any message, "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."

In contrast, placing Internet filtering software on public library Internet terminals does not in any way limit First Amendment activities on the Internet. Individuals may still engage in any type of speech they wish on the Internet. Then, through the use of software, libraries can choose which pieces of information it will make available to the public.

The government's ability to purchase or fund material it deems suitable notwithstanding, restrictions on "lascivious," "lewd," or "indecent" speech are not based on viewpoint. In R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992), the Court explained that, even though obscenity is

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[1] Similarly, the challenges to the Child Online Protection Act, 47 U.S.C. § 231 ("COPA") are not applicable here. COPA seeks to sanction those who "knowingly" make any commercial communication on the Internet "that is harmful to minors." In granting a preliminary injunction against the enforcement of COPA in ACLU v. Reno, 1999 WL 44852 (E.D.Pa., Feb. 1, 1999), the court ruled that it was "not apparent" that the government could meet its burden that "COPA is the least restrictive means avbailable to achieve the goal of restricting access of minors to [harmful] material." 1999 WL 44852 at 24. The court also acknowledged, however, that "blocking or filtering technology" appeared to be a less restrictive way of achieving COPA's goals. *Id.*

unprotected speech, a State could not prohibit "only that obscenity which includes offensive *political* messages," to do so would constitute viewpoint discrimination. However, the First Amendment does allow the government to "choose to prohibit only that obscenity which is the most patently offensive *in its prurience--i.e.*, that which involves the most lascivious displays of sexual activity." *Id*. Thus, in enunciating this principle, the Court relied on the premise that distinctions based on "prurience" or "lascivious[ness]" are not viewpoint discriminatory. *See also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (punishment of public high school student for use of "offensively lewd and indecent" language in speech to students was "unrelated to any political viewpoint"); Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982) (plurality opinion) (removal of books from public school library because of their "pervasive vulgarity" would be permissible whereas removal of books because of their "ideas" would not).

The Second Circuit adopted this reasoning in their recent decision in General Media Communciations, Inc. v. Cohen, 131 F.3d 273 (2d. Cir. 1997), *cert. denied*, 118 S. Ct. 2637 (1998). Cohen involved a constitutional challenge to the Military Honor and Decency Act which prohibits the sale or rental of recordings and periodicals at military exchanges "the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." 10 U.S.C. § 2489a(d). The appellees argued that the Act targeted a "viewpoint portraying women as sexual beings or as the focus of sexual desire, as well as a viewpoint of lasciviousness." *Id*. at 281 (internal quotations marks omitted). In dismissing this argument, the court held that the adjective "lascivious" helps identify the particular subject matter or content that the Act encompasses. From this, the court concluded that lasciviousness is not a viewpoint. *Id*.

at 282.

The majority of Internet filtering software is designed to block *all* Internet sites which are deemed to be prurient or lascivious. They are not designed to block out only those pornographic materials which may express a certain viewpoint. The use of such software by public libraries is constitutional, and is the only way, presently, in which libraries can provide their patrons with the Internet and still protect children from harmful materials.

2. A LIBRARY IS NOT A "PUBLIC FORUM" AND IS NOT REQUIRED TO BUY EVERY PIECE OF LITERATURE AVAILABLE

The Supreme Court has recognized three types of speech forums. Jews for Jesus, 482 U.S. 569, 572 (1987):[1]

1. Traditional public forum (e.g., city parks, Hague v. C.I.O., 307 U.S. 496 (1939)).

2. "Public forum created by government designation" (e.g., public university, Widmar v. Vincent, 454 U.S. 263 (1981)).

3. "Nonpublic forum" (e.g., jails, Adderley v. Florida, 385 U.S. 39 (1966)).

As noted *above*, parks are generally traditional open fora for religious speech activity. As the Court stated in Perry Education Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 45 (1983):

> In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation

[1] See also Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45-46 (1983); and Student Coalition for Peace v. Lower Merion School District, 776 F.2d 431 (3rd. Cir. 1985).

> is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Using this standard, libraries *qua* libraries are neither public forums nor open forums by government designation. For example, in Arkansas Educ. Television Comm'n v. Forbes, 118 S.Ct. 1633, 1637 (1998), a political candidate challenged a public television station's decision to exclude him from a televised debate, arguing that the televised debate was an open forum by government designation. The U.S. Supreme Court first addressed the question of whether public forum analysis was applicable in the broadcast setting. "Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule." *Id*. at 1640. Thus, the Court recognized that forum analysis is usually inapplicable in occupations which require the use of editorial discretion.

> As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. Programming decisions would be particularly vulnerable to claims of this type because even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint-based. To comply with their obligation to air programming that serves the public interest, broadcasters must often choose among speakers expressing different viewpoints. That editors--newspapers or broadcast--can and do abuse this power is beyond doubt, but calculated risks of abuse are taken in order to preserve higher values.

Id. at 1639 (internal quotation marks and citations omitted). Therefore, decisions such as "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum" by their very nature facilitate "the expression of some viewpoints instead of others." *Id*. If certain institutions were not allowed to exercise this discretion "we would exchange public trustee broadcasting, with all its limitations, for a system of

self-appointed editorial commentators." *Id*. at 1640. These "[c]laims of access under our public forum precedents could obstruct the legitimate purposes of television broadcasters." *Id*.

Accordingly, a library is not an open forum by government designation, but instead is a government agency which can exercise editorial discretion in its purchasing power. In National Endowment for the Arts v. Finley, 118 S.Ct. 2168 (1998), the Supreme Court emphasized that editorial discretion may be exercised by a governmental agency procuring art:

> And as we held in *Rust*, Congress may selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In doing so, 'the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Finley, 118 S.Ct. at 2178 (citations and internal quotation marks omitted). The Rust Court also specifically rejected the argument that government subsidies for the arts are equivalent to creating an open forum by government designation:

> The NEA's mandate is to make aesthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger* – which was available to all student organizations related to the educational purpose of the University – and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, or the second class mailing privileges available to all newspapers and other periodical publications.

Id. (citations and internal quotation marks omitted). Common sense dictates that libraries, like the NEA, cannot purchase all of the art or books that are available, and consequently, must exercise aesthetic judgments.

As the Forbes Court recognized, there is a danger in subjecting certain institutions to claims of viewpoint discrimination because aesthetic judgment is exercised, and as a consequence,

there is a resulting "suppression of information" because the decisions made were not all inclusive.[1] If institutions, such as broadcasting, were "faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all." Forbes, 118 S.Ct. at 1643. "In this circumstance, a government-enforced right of access inescapably dampens the vigor and limits the variety of public debate." *Id*. (internal quotation marks and citations omitted).

If subjected to forum analysis, libraries will also be faced with this dilemma. In accordance with their mission, libraries do not want to disseminate obscene information, information that may be harmful to minors, information that may create a hostile working environment, or information that simply does not comport with their mission. Many sites on the Internet contain that very type of information. Therefore, in order to further their mission and not subject themselves to liability, many libraries may forego acquiring the Internet, and, thus, suppress the free flow of information.

Another long established principle is that "the public forum doctrine should not be extended in a mechanical way" to "very different context[s]." *Forbes*, 118 S.Ct. 1633, 1639 (1998). The contexts in which the Court has applied "forum" analysis are unlike the public library

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[1] In support of this proposition, the Court cited to a decision by the Nebraska Educational Television Network canceling a scheduled debate between candidates in Nebraska's 1996 United States Senate race after they were informed of the Court of Appeals' decision in the *Forbes* case which held that the Arkansas television station's decision was unconstitutional. *Id*. at 1643.

setting. *See, e.g.,* Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 830 (1995) (student religious group seeking access to public university's student activities fund); International Society for Krishna Consciousness v. Lee, 505 U.S. 672, 679-683 (1992) (religious group seeking access to public areas of airline terminal); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-47 (1983) (rival teachers union seeking access to school mail system). Forum analysis has been applied by the Court only in cases in which the government has placed restrictions on its property which prevented private individuals from engaging in expressive activity.

By placing Internet filtering software on library Internet terminals, a library does not restrict individuals from engaging in expressive activity. The implementation of Internet filtering software in no way prohibits library patrons from possessing or discussing sexually explicit material. The use of Internet filtering software simply regulates the library's *own* activity as proprietor of the library. Inherent in the operation of any establishment which purchases material to be sold or loaned to the public is the ability to choose which products will be placed on its limited shelf space. In making these determinations, such establishments frequently take content, or even viewpoint, into account. Libraries necessarily have to make decisions based on content if, for example, they are attempting to establish a children's section, or to enlarge their American History collection. Therefore, because the setting is entirely different than those in which forum analysis has been applied, forum analysis is inapplicable in the public library setting.

CONCLUSION

Libraries and public schools have a compelling interest to protect the physical and psychological well-being of children, and not to foster a hostile working environment. Both of these interests are compromised when Internet access is left unchecked and patrons, young and old, are unwillingly or unwittingly exposed to the hardcore pornography available throughout the Internet. Libraries not only may implement reasonable, viewpoint neutral regulations to prohibit the access of pornography, but potential liability would argue for such implementation. The use of Internet filtering software is a reasonable, viewpoint neutral regulation which accomplishes the goal of eliminating access to pornography, and fosters the libraries' educational purposes.